

[ELECTRONIC SUBMISSION]

Queries may be addressed to:

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Having considered:

the Constitutional Court case of Mail and Guardian Media Limited and Others v Chipu N.O. and Others (Case CCT136/12), heard by the Court on 14 May 2013 (with judgement delivered on 27 September 2013); and

the Gazetted Notice 591 of 2015, calling for comments on the draft Refugees Amendment Bill of 2015; and

prevailing International and Domestic law regarding refugee protection both internationally and within South Africa's unique circumstances;

LHR hereby submits these comments on the draft Refugees Amendment Bill of 2015.

1. Background to the Constitutional Court's Ruling

The following summary of the Court proceedings and findings is available via www.saflii.org.za:

“On 27 September 2013 the Constitutional Court upheld an appeal against a judgment of the North Gauteng High Court, Pretoria concerning the constitutionality of section 21(5) of the Refugees Act. That section provides that the “confidentiality of asylum applications and the information contained therein must be ensured at all times”, thus preventing any member of the public or the media from attending asylum application proceedings.

The second respondent, Mr Radovan Krejcir, applied for asylum in South Africa in 2007. After his application for asylum was refused, Mr Krejcir appealed to the Refugee Appeal Board (RAB). The applicants, comprising three newspaper companies, requested the RAB’s permission to have journalists present during Mr Krejcir’s appeal hearing in order to report on the proceedings. Their requests were refused.

The applicants sought to have the RAB’s refusal decision set aside in the High Court. In the alternative, the applicants sought an order declaring section 21(5) unconstitutional to the extent that it precludes members of the public or the media from attending and reporting on RAB proceedings in any circumstances.

The High Court dismissed the challenge to the refusal decision and held that section 21(5) of the Refugees Act constituted a limitation on the freedom of the press and other media, as well as the freedom to receive or impart information or ideas. However, the High Court concluded that the limitation was justifiable given the importance of confidentiality to the integrity of the asylum process. The Court thus declared section 21(5) to be constitutional.

In the Constitutional Court, the main issue was whether the requirement of absolute confidentiality in proceedings before the RAB is a justifiable limitation of the constitutional right to freedom of expression (which includes the freedom of the press and the freedom to receive and impart information or ideas).

The applicants argued that absolute confidentiality was an unjustifiable limitation of this right, and requested the Court to read provisions into the Refugees Act conferring a discretion on the RAB to allow third parties to attend certain hearings and to publish in relation thereto. The respondents contended that a rule of absolute confidentiality is required in order to maintain an effective asylum system, and therefore that section 21(5) constitutes a reasonable and justifiable limitation on the right to freedom of expression.

The Southern Africa Litigation Centre (SALC) was admitted as an *amicus curiae*. SALC's concern was that the requirement of absolute confidentiality in asylum proceedings renders the asylum system vulnerable to abuse, compromising South Africa's obligations to ensure accountability for international crimes.

In a unanimous judgment written by Zondo J, the Constitutional Court held that, to the extent that section 21(5) does not confer a discretion upon the RAB to allow access to its proceedings in appropriate cases, the limitation on the right to freedom of expression is unreasonable, unjustifiable and accordingly invalid. The Court suspended the declaration of invalidity for a period of two years to allow Parliament an opportunity to remedy the defect. The Court crafted a temporary reading-in order, conferring a discretion on the RAB, on application and on conditions it deems fit, to allow any person to attend and report on its hearings. This discretion must be exercised with due regard to relevant factors, such as whether the asylum seeker consents to the third party's access or whether it is in the public interest to allow such attendance.

The Court declined to make an order permitting the media access to Mr Krejcir's appeal hearing because the applicants had elected not to appeal against the High Court's decision upholding the RAB's refusal and further because, after the handing down of the judgment, the RAB will have the discretion to relax the requirement of confidentiality."

2. LHR's interest in the matter

Lawyers for Human Rights (LHR) was established in 1979 and is a registered non-profit organisation in terms of Act 71 of 1997 (registration number 027-928NPO).

LHR is an independent human rights organisation with a more than thirty-five year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of the South African society.

LHR provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who seek to enforce their constitutional rights through the principles of human dignity, equality and freedom. LHR provides marginalised individuals and communities with legal advice and strategic legal representation.

Established in 1996, LHR's Refugee and Migrant Rights Program is a specialist program that advocates, strengthens and enforces the rights of asylum-seekers, refugees and other marginalised categories of migrants in South Africa.

With six offices spread around the country, LHR has a national footprint and offers legal services, including legal representation, strategic litigation and advocacy assistance to communities across the country. The Refugee and Migrant Rights Programme operates from the Pretoria, Johannesburg, Durban and Musina offices.

LHR's clinics offer legal advice and representation in court. Our clinics are registered under the law society within each province and operate in all levels of courts. We also support advocacy and rights education in the programme areas within which we work. All programmes have a national footprint and incorporate the overarching themes of non-

discrimination, gender equality, child protection and anti-corruption efforts in their activities.

LHR also undertakes vigorous detention monitoring which documents the human rights abuses suffered by migrants in the detention and deportation process and advocates for policy reform. Legal assistance is also given to those who have been unlawfully arrested and who are at risk of deportation.

LHR has therefore established itself as an expert in refugee protection in South Africa and the region and makes comments from that standing.

3. LHR's comments on the proposed Amendment Bill of 2015

LHR has reviewed the proposed amendments and is of the opinion that they correspond with the meaning and spirit of the Constitutional Court judgement which necessitated the amendment.

LHR views respect for the rule of law and Court orders as fundamental to Constitutionalism and does not raise any resistance or objection to the enactment of the amendment and commends the compliance by the Portfolio Committee with the spirit and substance of the Court order.

We are disappointed, however, that the Department of Home Affairs failed to adhere to the ruling of the Constitutional Court to introduce legislation within two years as required. The time period set out by the Court was more than enough to prepare and introduce legislation. This failure put the confidentiality, as well as the integrity and security, of our asylum system at risk as section 21(5) of the Refugees Act would have ceased operation and no provisions relating to confidentiality would have protected asylum seekers and refugees in terms of the Act. We encourage Parliamentarians to continue to be vigilant in ensuring that the Department lives up to its constitutional and legislative obligations.

We further call on the Committee to examine an emerging pattern of non-compliance with court orders by the Department of Home Affairs and its officials. Further information can be made available regarding non-compliance of court orders outside of the scope of these

submissions should the Committee wish to receive submissions on other instances of non-compliance.

[BY ELECTRONIC SUBMISSION]